



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2009

Ms. Kathleen Decker
Director - Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2009-14858

Dear Ms. Decker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 358668 (TCEQ PIR No. 09.07.29.04).

The Texas Commission on Environmental Quality ("TCEQ") received a request for all records regarding the Equistar Chemicals Chocolate Bayou Complex for a specified period of time. You state you have made available portions of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110, and 552.111 of the Government Code.¹ You also state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the commission has notified Equistar Chemicals, LP ("Equistar") and Solutia, Inc. ("Solutia") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have

¹We understand TCEQ to raise section 552.111 of the Government Code in asserting the attorney work product privilege. *See* Open Records Decision No. 677 (2002).

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither of the third parties has submitted comments to this office explaining why any portion of the submitted information should not be released to the requestor. Therefore, we have no basis to conclude that any of the third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Although TCEQ also raises section 552.110 of the Government Code for the third parties' information, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address TCEQ's argument under section 552.110 for the submitted information. Accordingly, TCEQ may not withhold any portion of the submitted information on the basis of any proprietary interests that Equistar or Solutia may have in this information. We will, however, address the submitted arguments to withhold portions of the submitted information.

You claim that the information within Attachment C is subject to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes, including section 382.041 of the Health and Safety Code, which provides in part that "a member, employee, or agent of [TCEQ] may not disclose information submitted to [TCEQ] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). This office has concluded that section 382.041 protects information that is submitted to TCEQ if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential when submitting it to TCEQ. *See* Open Records Decision No. 652 (1997). TCEQ states that Equistar and Solutia marked the submitted documents as

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

confidential when they provided them to TCEQ.³ However, we have received no arguments from Equistar or Solutia that any of their information constitutes a trade secret. Therefore, TCEQ may not withhold any of Equistar's or Solutia's information within Attachment C under section 552.101 in conjunction with section 382.041.

We note that some of the information within Attachment D is subject to section 552.022 of the Government Code, which provides in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). Accordingly, TCEQ may withhold the information we have marked under sections 552.022(a)(3) and 552.022(a)(17) only if such information is "expressly confidential under other law." Sections 552.103, 552.107, and 552.111 are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Thus, the information subject to section 552.022 may not be withheld under any of these exceptions. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil

³We note that information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110).

Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is also found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 for the submitted information subject to section 552.022. We also note that portions of these section 552.022 documents are subject to section 552.136 of the Government Code.⁴ Furthermore, we will consider your claims under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the information subject to section 552.022 within Exhibit D consists of “privileged communications providing legal advice . . . or documenting client confidences relating to such legal advice.” However, the information subject to section 552.022 consists of information relating to the receipt of public funds by TCEQ and court-filed documents within TCEQ’s records that exist separate and apart from the attorney-client communications. Thus, we find you have not demonstrated how the documents that exist separate and apart from the attorney-client communications constitute confidential communications between privileged parties. Therefore, these records are not privileged under rule 503 of the Texas Rules of Evidence and may not be withheld on that basis.

For purposes of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). A governmental body seeking to withhold information under this privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You contend that the information subject to 552.022 constitutes attorney work product and state that the documents at issue “consist of or show the attorney’s mental processes.” As stated above, the information subject to section 552.022 consists of information relating to the receipt of public funds and court-filed documents. Upon review, however, you have not demonstrated that any of this information consists of the mental impressions, opinions,

conclusions, or legal theories of an attorney or an attorney's representative. Therefore, none of the information subject to section 552.022 may be withheld under rule 192.5 of the Texas Rules of Civil Procedure.

The information subject to section 552.022 contains bank account and routing numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the bank account and routing numbers in the information subject to section 552.022 that must be withheld under section 552.136 of the Government Code.

You assert that the remaining information in Attachment D is subject to section 552.103 of the Government Code, which provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). TCEQ has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). TCEQ must meet both prongs of this test for information to be excepted under section 552.103(a).

You raise section 552.103 for the remaining documents within Attachment D. You inform this office that TCEQ was a party to pending adversary proceedings in the United States Bankruptcy Court for the Southern District of New York when the present request for information was received. You state, and the documents reflect, that the remaining information within Attachment D relates to this pending litigation. Based on your representations and our review, we agree litigation was pending as of the date the request was received. We further find the information at issue relates to the pending litigation. Accordingly, TCEQ may generally withhold the remaining information not subject to section 552.022 in Attachment D pursuant to section 552.103 of the Government Code.

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to the pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the litigation has seen or had access to is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, the opposing party to the litigation has already seen or had access to some of the remaining information. Therefore, this information, which we have marked, may not be withheld under section 552.103. However, the remaining information at issue may be withheld under section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

With respect to the information that may not be withheld under section 552.103, we will address your arguments under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). The elements of the privilege under section 552.107 are the same as those for Rule 503 outlined above.

As previously noted, you state the e-mails, letters, and attachments at issue are "privileged communications providing legal advice . . . or documenting client confidences relating to such legal advice." However, you have not explained how communications seen by the opposing party in litigation with TCEQ constitute communications between privileged parties. Thus, we find you have failed to establish the applicability of the attorney-client privilege to the remaining information that may not be withheld under section 552.103. Accordingly, this information may not be withheld under section 552.107 of the Government Code.

Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under the work product aspect of section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning Texas Rule of Civil Procedure 192.5.

You contend that the remaining information that may not be withheld under section 552.103 is subject to the attorney work product privilege encompassed by section 552.111. We conclude that because the opposing party to litigation has seen the information at issue, the work product privilege under section 552.111 has been waived. Therefore, the remaining information that may not be withheld under section 552.103 also may not be withheld under section 552.111 of the Government Code.

We note that the remaining information in Attachments C and D contains e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't

Code § 552.137(a)-(c). The e-mail addresses in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, TCEQ must withhold the information we have marked under section 552.136 of the Government Code from the information subject to section 552.022. With the exception of information that has been seen by the opposing party, TCEQ may generally withhold the documents not subject to section 552.022 in Attachment D pursuant to section 552.103 of the Government Code. TCEQ must withhold the e-mail addresses in Attachments C and D under section 552.137, unless the owners of the addresses have affirmatively consented to their release. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

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Enc. Submitted documents

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